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IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,

Petitioners,

v.

THE STATE OF COLORADO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

BRIEF ON THE MERITS FOR RESPONDENTS KEN SALAZAR, STATE OF COLORADO, BILL OWENS, GOVERNOR AND CITY OF LAKEWOOD

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QUESTIONS PRESENTED FOR REVIEW

Section 18-9-122(3), C.R.S. (1999), prevents intimidation and potential obstruction of patients within 100 feet of any health care facility entrance. It prohibits only:

- knowingly approaching another person more closely than eight feet;
- without the consent of that person;
- for the purpose of demonstrating directed at that specific person.

The questions presented are:

1. Was the Colorado Supreme Court correct in holding the statute constitutional as a reasonable statutory regulation of the time, place or manner of expressive activity?

2. Is the statute an unconstitutional prior restraint?

3. Is the statute unconstitutionally vague or overbroad?

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STATEMENT OF THE CASE

In 1993, the Colorado General Assembly enacted § 18-9-122, C.R.S. (1999), to address the continuing problem of aggressive, sometimes violent demonstrations that obstructed safe access to health care. Prior to passing this law, the legislature considered testimony from a number of witnesses who had personally experienced obstructive and uncontrolled demonstrations outside health care facilities in Colorado, where crowds of demonstrators blocked access, J.A. at 93-95, 158-59,[1] and pushed, shoved, grabbed, kicked, punched, and bit patients and escorts. J.A. 94. One escort described being "hit by men twice my size while trying to get 12 and 13-year-old patients into the clinic, protecting them with my body." J.A. 105. The crush of demonstrators made it difficult to impossible to identify those responsible for the assaults and enforce existing laws. J.A. 94, 159, *see also* J.A. 224. The witnesses spoke of their fear for their physical safety, J.A. 93, in the midst of demonstrations they described as frightening, dangerous, threatening and intimidating. J.A. 94, 224.

The legislature also heard testimony about smaller groups of demonstrators, who nevertheless surrounded patients, escorts, and vehicles at close range, J.A. 70, 154, *see also* J.A. 218, 223-24, leaning into open car windows, J.A. 152, thrusting signs and leaflets into faces, J.A. 66, 70, 154, *see also* J.A. 229, and into windows of cars or onto windshields, J.A. 67, 99, 105-06. Again, the result was threats, *see* J.A. 224, fear for physical safety, *see* J.A. 218, 229, and physical intimidation, sometimes bringing patients to a standstill. J.A. 106, *see also* J.A. 222.

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1. The legislative history in this case is corroborated by the sworn affidavits submitted in support of Colorado's Motion for Summary Judgment. *See, e.g.*, J.A. at 224. This case was decided on motions for summary judgment and the facts recited in the legislative history and the affidavits are uncontroverted. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (burden shifts to opponent after movant has established facts supporting summary judgment).

The legislature also heard of physical altercations between demonstrators and family members of patients, triggered by demonstrators' confrontational, in-your-face tactics. J.A. 100, 106, *see also* J.A. 225-26, 230.

In addition, the legislature was informed of several instances of disruptive and violent demonstrations on other issues outside medical facilities, and the disabled community's fear that:

> [A]s Operation Rescue and those types of organizations gain more publicity and higher profile, others begin to copy their tactics and techniques and that, of course, brings great concern to our community because people with disabilities tend to be targets. We are seen as vulnerable. We are seen as easy to push around. . . . Without bills like this, I think we're gonna see this kind of effort grow, increase and spread to other areas, and that's of great concern to me, and we certainly need to discourage that.

J.A. 155-57, *see also* J.A. 109.

The legislature was informed of ordinances passed by the Colorado communities of Denver and Boulder, which established eight-foot zones of separation between demonstrators and patients,[2] J.A. 60, 134, 147, 210, and of the federal district court ruling upholding the Boulder ordinance.[3] J.A. 116. Other witnesses described use of the ordinances to create a "zone of safety" for access to clinics, J.A. 70, *see also* J.A. 151, 154, 218-19, 221, 223, 225-26, 230, 281, including use by demonstrators to protect themselves. J.A. 106, *see also*

2. The text of these ordinances was attached to Defendants' Joint Motion for Summary Judgment as Appendix I, docketed March 7, 1994. R. Vol. II, at 278.

3. A transcript of the federal district court's bench ruling upholding the Boulder ordinance was attached as Appendix H to Defendants' Joint Motion for Summary Judgment, docketed March 7, 1994. R. Vol. II, at 263-76.

J.A. 226. The bill's sponsor stated that the effect of the ordinances, and the intended effect of the bill, was "everybody knows about it so they stay 8 feet away, and, therefore, there haven't been as many problems or confrontations." J.A. 127-28.[4] This mirrors the experience of Petitioners here, who have demonstrated under the Denver and Boulder ordinances, as well as Colorado's statute, while observing the place limitations, and have never been arrested or charged. J.A. 231-32, ¶¶ 1-9, 238-39, ¶ 12, 242-43, ¶¶ 1-9, 249, ¶¶ 11-12, 251-52, ¶¶ 1-9, 258, ¶ 11.[5] The legislature was also informed of buffer zones imposed elsewhere in the nation to preserve health care access. J.A. 61, 149, 213-14; *see, e.g., Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987).

To address this well-documented threat to public health and the maintenance of law and order, the legislature enacted § 18-9-122. The statute takes a two-pronged approach designed to prevent abusive conduct while allowing **all** speech. In subsection (2), physical blockades were prohibited. In the challenged subsection (3), the legislature prohibited overly close approaches to unconsenting targets of the demonstrators: conduct which crowded and threatened vulnerable medical patients. J.A. 113-14, *see also* J.A. 224-25, 227, 229. The legislature discussed eliminating subsection (3) and relying solely on the prohibition of blockades, but determined that would provide insufficient protection, especially in the crowd situations

4. As of December 6, 1999, the Colorado State Judicial Administrator and the Colorado District Attorneys' Council computer systems verify that there have been no criminal charges or civil complaints filed under Colorado's statute in the more than six years since its passage, although demonstrations have continued, indicating that the statute, like the ordinances, has helped keep the peace as it was intended to do.

5. Petitioners state erroneously that Petitioner Simpson "discontinued his expressive activities," Pet. Br. at 4, but his responses to discovery indicated that he continued demonstrating outside the 100-foot zone around health care facility entrances. J.A. 258, ¶ 11.

that had been described. J.A. 117, 124-25. A revision to the harassment statute was also proposed as an alternative to subsection (3), but rejected as unclear, difficult to enforce, and possibly impermissibly content-based. J.A. 120-25.

Petitioners brought this challenge in Jefferson County District Court, seeking declaratory and injunctive relief. The district court evaluated the statute under the test set out by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Pet. App. 32a. First, the court determined that the statute was content-neutral, because "it does not govern the subject matter of the message." Pet. App. 33a. The court further determined that the statute was narrowly tailored to a significant governmental interest, protecting those seeking access to health care facilities from "being threatened, harassed or assaulted." Pet. App. 33a. Finally, the court found that the statute left open ample alternative means of communication, only making it "more difficult for Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape," but allowing all activities outside the place limitations in the statute. Pet. App. 34a. The district court also rejected Petitioners' overbreadth, vagueness, and prior restraint arguments, and dismissed the complaint. Pet. App. 34a-36a.

The Colorado Court of Appeals affirmed. Referencing this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court of Appeals found the statute content-neutral, applying equally to demonstrators on both sides of the issue and not depending on the "specific viewpoint" of any demonstrator. Pet. App. 42a. The court also found the statute narrowly tailored, leaving ample alternatives, observing that it "merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff." Pet. App. 43a. The court read Petitioners' overbreadth challenge as answered by its finding on narrow tailoring, Pet. App. 43a, and determined that the statute was neither vague nor a prior restraint. Pet. App. 44a-45a.

The Colorado Supreme Court denied certiorari. This Court granted certiorari, vacated the Court of Appeals' decision without opinion and remanded the case for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Pet. App. 46a-48a. On remand, the Colorado Court of Appeals applied the *Ward* test, as expressly approved in *Madsen* and *Schenck*, Pet. App. 55a-56a. The Court of Appeals found that the statute differed from the invalid injunction in *Schenck*, Pet. App. 56a-57a, and ultimately determined that:

> [I]t is not unreasonable to require protesters to give way to a distance of eight feet so that one with physical disabilities has unimpeded access to a medical clinic especially when the protester can still vocally express his or her views on the issue at hand in a normal conversational voice.

Pet. App. 57a.

The Colorado Supreme Court affirmed. The issue before the Colorado Supreme Court was limited to whether the Court of Appeals erred in holding the statute constitutional upon reconsideration in light of *Schenck*. Pet. App. 59a. The Colorado Supreme Court first reviewed the legislative history that showed the interference with access to medical facilities, Pet. App. 5a-10a, and then evaluated the Colorado General Assembly's effort to accommodate both free speech rights and the right of access to medical care. Although the *Ward* test only requires a substantial governmental interest to sustain the statute, the Colorado Supreme Court found that the right of access to medical treatment was a fundamental right, relying on this Court's rulings that the right of privacy extends to medical decisions. Pet. App. 14a-16a.

The Colorado court then carefully reviewed this Court's decision in *Schenck*, Pet. App. 16a-19a, 27a-28a, and determined that this statute passed constitutional muster under *Schenck* for

two reasons. First, as expressly set forth in *Madsen*, this statute was to be evaluated under the somewhat less stringent *Ward* test. The Colorado Supreme Court understood Petitioners' counsel to have conceded that the *Ward* test was the appropriate test to be applied to evaluate the statute. Pet. App. 11a.[6]

Second, the statute was drawn more narrowly than the *Schenck* injunction, so that the court "[did] not believe that, even under the *Schenck* test, section 18-9-122(3) burdens more speech than is necessary." Pet. App. 28a. Accordingly, the court held the statute "a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities." Pet. App. 29a.

SUMMARY OF ARGUMENT

Colorado's statute regulates only conduct by demonstrators shown to impede safe access to health care, endanger public safety, and hinder effective law enforcement. On public ways or sidewalks within 100 feet of any health care facility entrance, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that person; (3) for the purpose of demonstrating directed at that specific person. The consent provision leaves demonstrators' First Amendment rights to reach the minds of willing listeners completely unrestricted. Unwilling targets of demonstrators will still be exposed to the full range of demonstrators' messages, whether expressed through a normal conversational tone, shouting, bullhorns, signs, or waving leaflets; the small zone of

6. In evaluating the content-neutrality of the statute under the *Ward* test, the Colorado Supreme Court also noted that Petitioners had not contended that the statute was content-based in this appeal. Pet. App. 21a. Petitioners now dispute this interpretation, *see* Reply to Brief in Opposition at 4-6, but their quote from the oral argument before the Colorado Supreme Court does not appear to support their argument. *Id.* at 2a. The Colorado Supreme Court's decision is correct whether or not Petitioners waived these arguments.

separation merely insulates medical patients, family and staff from the most physically threatening, obstructive, and harassing component of demonstrators' conduct.

Because the statute represents the Colorado General Assembly's policy choice on the most effective means of accomplishing key police power goals of public health and safety, it must be evaluated under this Court's well-settled reasonable time, place, and manner test. It must be content-neutral; be narrowly tailored to serve a substantial governmental interest (although not necessarily the least restrictive alternative); and leave open ample alternative channels of communication. The statute more than satisfies this test.

The statute's language, legislative history, and interpretation by the Colorado Supreme Court all demonstrate that it is content-neutral, applying to all demonstrations on any topic or espousing any viewpoint. The statute's focus is on the intrusive conduct of a demonstrator's unconsented approach, not on the demonstrator's message. The requirement of consent for an approach incorporates a well-recognized legal concept used to regulate physical interactions, from trespass to sexual assault, giving medical patients control over demonstrators' close approaches, but not their messages. Unlike the heckler's veto, it does not allow a hostile mob to drive an unpopular speaker from the streets; instead, it provides a patient a few arms' lengths of space between her and a hostile mob of demonstrators.

The statute is narrowly tailored to serve substantial governmental interests in health, safety, law enforcement, and traffic flow. The statute is actually the least restrictive alternative to serve a compelling governmental interest, considering the state's compelling interest in preserving safe access to health care, the more restrictive alternatives rejected in favor of this statute, and the lack of any narrower alternatives that would prevent crowding and physical threats to patients.

The statute leaves open ample alternative channels of communication. The only avenue of communication restricted is nose-to-nose harangues of an unwilling listener. As the Colorado Supreme Court found, everyone in the vicinity of health care facilities is "still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature"; they just cannot approach an unconsenting individual within eight feet. Pet. App. 27a.

The statute is neither overbroad, a prior restraint, nor vague. It does not prevent the expression of any message either to the public at large or to individually targeted patients, but prevents only the physical intimidation of patients by demonstrators who approach too closely. It sets clear standards of distance, using commonly understood concepts.

Petitioners' and *amici's* arguments against the statute either misrepresent the operation of the statute or advocate a new First Amendment right consistently rejected by this Court: the coercive right to pursue, surround, crowd, abuse and physically threaten medical patients until they accept demonstrators' unwanted messages. This Court should reject such a distortion of free speech and uphold the constitutionality of Colorado's statute.

ARGUMENT

I.

THE STATUTE OPERATES WITH PRECISION TO PROTECT ACCESS TO HEALTH CARE, PUBLIC SAFETY, AND PEDESTRIAN AND TRAFFIC MOVEMENT WHILE BURDENING AS LITTLE EXPRESSIVE ACTIVITY AS POSSIBLE.

Petitioners and their supporting *amici* persistently misrepresent the statute, likening it to numerous invalid flat bans on expressive activity, *see, e.g.*, Pet. Br. at 19,[7] or misstating its approach provision. Pet. Br. at i, 29, 35, 37; AFL-CIO Br. at 13 n.6; PETA Br. at 9; Liberty Counsel Br. at 7, 12, 15. In reality, the Colorado General Assembly took great care not to ban **any** expressive activity, but to set understandable ground rules for such activities immediately outside hospitals, clinics, and doctors' offices. No communication, regardless of how unwelcome, is prevented, only its overly close proximity. The statute does not censor speech, drive any message from a public forum, or create a heckler's veto. It creates a small zone of safety — about three steps — around individuals outside medical clinics to allow unimpeded movement; to prevent crowding, physical intimidation, and threats; to allow visibility and space for police to be able to enforce the law; and to allow room for those who are following this Court's instructions to simply turn away from unwanted messages to do so. Each provision of § 18-9-122(3) is necessary to accomplish the protection of core governmental interests in public safety and health.

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7. *See also* Pet. Br. at 20, 21, 23, 25, 27, 33 n.25, 34, 37, 39, 40 n.32, 44; AFL-CIO Br. at 12 n.5; PETA Br. at 15, 17; Liberty Counsel Br. at 3, 19, 21; *but see* ACLU Br. at 20.

A. The statute applies only *within 100 feet of health care facility entrances*. This place limitation is directly tied to the legislature's fundamental purpose of protecting health, which is at the core of the state's police power. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The statute applies on public ways and sidewalks immediately outside health care facilities such as hospitals, where this Court has recognized a heightened need for tranquillity. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-85 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (courts, libraries, schools, and hospitals "require peace and quiet to carry out their functions"). This access area is also where the targets of the demonstrations are most likely to be physically impaired and thus more vulnerable to both intimidation and obstructive crowding. *Cf. ISKCON v. Lee*, 505 U.S. 672, 684 (1992) (noting the risk of duress from a solicitor targeting "the most vulnerable, including . . . those suffering physical impairment and who cannot easily avoid the solicitation."). Such targets are also less likely to be able to simply turn away from an unwelcome message when it is thrust upon them at close quarters.

The legislature's concern extended not only to the permanently disabled, who may need extensive health care, *see* J.A. 155-56, but to those facing medical procedures such as surgery, which is best performed on a patient not subjected to the stressful conduct of crowding and physical intimidation. *See* J.A. 108, 220-21, 273-75. Ultimately, the legislature acted to preserve the right of all Coloradans to choose "health services which could save their lives, such as cancer screening and treatment, routine medical examinations and pap smears." J.A. 59; *see also* J.A. 113 ("the right of any patient to seek the medical treatment they need.").[8] Thus the statute is limited to

8. Even at reproductive health care clinics, 93% of the patients seeking access were there for health care other than abortions. J.A. 62, 150.

the 100-foot zone immediately outside health care facility entrances, but is not limited to any particular type of health care facility.[9] The 100-foot zone closely corresponds to the area where patients can no longer cross the street or detour around demonstrations, but must run a gauntlet to get into clinics and hospitals. This unique and important concern with safe access to medical care applies outside all health care facilities, as distinguished from commercial businesses or government offices.

The statute applies to all persons within this medical entrance zone because it is the most effective, least intrusive means to accomplish the legislature's public safety and health purposes. The legislature was concerned with those seeking access, whether patients, family, or staff. J.A. 61, 147-48; *see also* § 18-9-122(1), C.R.S. (1999). Persons within this zone are the most likely to be seeking access to the medical facility. Those who have no need to access medical facilities are likely to cross the street to avoid a demonstration. Within this medical entrance zone, the need to regulate crowding and physically intimidating conduct took priority over distinguishing between those seeking access and the occasional passerby. Requiring targeted patients to publicly identify themselves to claim the statute's protection would invade their privacy and increase their vulnerability. Placing the burden on demonstrators to distinguish between those seeking access and passersby would make the statute less clear and compliance more difficult.

9. "Health care facility" is defined as "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state." § 18-9-122(4), C.R.S. (1999). The offices of dentists, chiropractors, or optometrists are not covered, contrary to amici's assertion. Life LDF Br. at 13. *See* § 12-36-106, C.R.S. (1999) (defining the practice of medicine). The legislature was clearly talking about **physical locations** with "entrance doors," so that "entity" does not refer to individual doctors. Life LDF Br. at 14.

B. The statute applies only *within eight feet of another person* within the 100-foot entrance zone. "[Eight] feet is a reasonable distance, it's roughly two arms' length away, and in conversation with strangers in public areas, it's just about the distance that you'd be comfortable standing at." J.A. 151. The Boulder and Denver ordinances which served as partial models for this law also used this distance, and the federal district court upheld the Boulder ordinance, relying on the finding of social scientists that this is the normal distance for initiation of conversations between strangers in public. R. Vol. II, at 263-276; *see also* J.A. 227-29, 273. The legislature relied on empirical knowledge as well as social science. As the federal district court evaluating the Boulder ordinance observed, "[Y]ou know, that's rather obvious and that's rather true. When someone comes too close, you back up and you do feel threatened." R. Vol. II, at 268. The legislative debate is rife with the need to prevent physical intimidation, J.A. 59, 95, 114, 151, 181, and the repeated references to "in-your-face" demonstrating and "get out of my face" are colloquial shorthand for the same simple concept — that overly close approaches are obstructive and threatening. One legislator noted that the effect of the statute was simply to define the unconsented-to approach within eight feet as a threat, rather than leaving the definition of a threat up to the judgment of police. J.A. 164. The distance makes things more clear for law enforcement and protesters alike, especially in crowd situations, J.A. 117, 122, 124-25, and also serves to defuse confrontations that could lead to violence. J.A. 138 ("Kindergarten teachers pull kids apart when they begin to have fights."); *see also* J.A. 224, 225, 230.

Finally, the legislature carefully determined that the eight-foot distance would serve all of the above purposes **without preventing the expression of demonstrators' messages to their intended audiences**. J.A. 78, 82, 107, 137, 149, 202, 206, 211. Even an opponent of the bill argued that someone could "measure themselves eight-feet and one inch, and say any foolish

or wrong thing they want to someone, it's not going to change that." J.A. 80. The bill's sponsor stated that the purpose of the eight-foot limitation was to:

> protect the patient's right to be free from the kind of spitting, the kind of intense intimidation and physical threat that they are now [experiencing], while at the same time protecting the rights of people who are trying to counsel them and talk to them. Eight feet is far enough so that you can't get up into someone's face and stop them from moving. However, eight feet is also close enough so if you say to someone, "Would you like to take a pamphlet?" or you say to them "You're killing your baby. I'd like to talk to you about that," that person can clearly hear and see what you're saying and, if they're interested in receiving your information, can consent. . . .

J.A. 114. The eight-foot distance was chosen to insure no interference with communication, yet prevent crowding and physical threats.

C. The statute applies only *to knowingly approaching another person for the purpose of demonstrating directed at that specific person*. This provision precisely regulates the intimidating conduct of targeting patients with inescapable messages and crowding. The requirement that the approach must be done "knowingly" insures that inadvertent conduct will not be punished. "Approach" regulates only the physical movement of the demonstrator toward his target, responding to the descriptions of patients subject to intrusive approaches. *See* J.A. 59 ("come inches away from people's faces"), 70 ("surrounded"), 106 ("pamphlets were shoved into her car against her will"). The legislature was clear that the bill did not regulate standing still. J.A. 76-78. Demonstrators who either stand still or stay a few steps away raise lesser risks of physical intimidation or interference with access than those who closely pursue and surround their targets.

By regulating approaches made for demonstration purposes, this provision narrowly addresses the conduct shown to interfere with access through crowding and physical threats. A person walking past on the street, with no eye contact or attempt to communicate, is an everyday occurrence which triggers little sense of threat or risk of obstruction. The social science findings on the threatening effect of overly close approaches apply to approaches for some kind of interaction or communication. J.A. 227-28, ¶¶ 6-8, 286-88, ¶¶ 10-12. The access problems the bill was designed to correct were all the result of approaches made by demonstrators.

By regulating only "approaches," the statute requires an affirmative action by the demonstrator to violate the statute, and the demonstrator does not have to back away from an oncoming listener. Further, because the demonstrator controls both the approach and the purpose, punishing inadvertent approaches is avoided.

D. The statute applies only to knowing approaches of another person *without the consent of that other person*. The legislature included the consent provision specifically to make sure the statute burdened as little speech as possible, allowing anyone who wishes to accept a leaflet, closely study a sign, or engage in a close personal conversation to do so. J.A. 118, 148, 211; *see also* J.A. 82, 114-15, 123.[10] Targeted patients, staff and family who wish only to gain access to clinics without engaging in argument or accepting a leaflet may do so without having to dodge or run. All people, whether they grant or withhold consent, are protected from threatening and physically intimidating conduct, because it is unexpected, undesired approaches which produce such reactions; and being in control of the proximity of the approach decreases the threat and sense of invasion. J.A. 285-89; *see also* J.A. 227-29. This provision also eliminates any possibility of a bystander or

10. Consent was to be interpreted broadly to include non-verbal consent. J.A. 61, 82, 115, 185.

companion controlling the demonstrator's approach, because it is the consent of the person the demonstrator seeks to communicate with that controls.

The requirement of consent up front rather than a "back off" provision adds clarity, and actually makes it easier to comply with the statute. *See* J.A. 118. It also provides protection before an approach becomes a threat, rather than after the harm has already occurred, especially for a silent target too intimidated to say "back off." *See* J.A. 98.

Each provision of the statute was chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement.

II.

THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT THE STATUTE IS CONSTITUTIONAL, APPLYING THIS COURT'S LONG-SETTLED "REASONABLE TIME, PLACE, OR MANNER" STANDARD.

A. Legislatures should be allowed policy choices among reasonable alternative approaches when regulating the time, place, or manner of expressive activities to serve other important societal interests. As this Court noted in adopting a more stringent standard of review for court-imposed injunctions, statutes and ordinances "represent a legislative choice regarding the promotion of particular societal interests." *Madsen*, 512 U.S. at 764. Because they apply generally rather than to an individual or small group before the court, statutes create lesser risks of censorship or discrimination. *Id.*

Legislatures are often faced with a number of arguably effective means of accomplishing their policy goals, and are uniquely suited to choose, after public debate and submissions

from affected parties, among those means for the most effective implementation of their policy choices. *See Turner Broadcasting System v. FCC*, 520 U.S. 180, 199 (1997) (describing nature of legislative process). The same facts may support different conclusions in the judgment of different decisionmakers. This Court, therefore, has guarded against a judge substituting his policy choice for a legislature's, consistently holding that the validity of time, place or manner regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Turner Broadcasting System*, 520 U.S. at 218, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). Otherwise, courts would have to sift through all imaginable means to determine whether the chosen legislative scheme was the precisely least intrusive means of achieving its desired end, an approach this Court has consistently refused to require. *Turner Broadcasting System*, 520 U.S. at 217-18.

Accordingly, the Colorado General Assembly's determination of the means most suited to accomplish its health and safety purposes, unlike a single judge's injunction, must be reviewed simply to determine whether the means chosen are "substantially broader than necessary" to accomplish the governmental interests. *Turner Broadcasting System*, 520 U.S. at 218, quoting *Ward*, 491 U.S. at 800. The legislature's chosen method "need not be the least restrictive or the least intrusive means." *Ward*, 491 U.S. at 798.

B. The Colorado courts carefully followed this Court's precedents and properly evaluated the statute under the *Ward* test. The Colorado Supreme Court applied this Court's holding that:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they

> are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Turner Broadcasting System*, 520 U.S. at 215-16; *Madsen*, 512 U.S. at 764; *Ward v. Rock Against Racism*, 491 U.S. at 791; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). This Court has determined that the above "standard time, place, and manner analysis is not sufficiently rigorous" for the evaluation of speech-regulating injunctions. *Schenck*, 519 U.S. at 371, quoting *Madsen*, 512 U.S. at 765.

Petitioners and their supporting *amici*, however, attempt to contrast Colorado's statute unfavorably with the injunctions evaluated in *Schenck* and *Madsen*, arguing the statute is overbroad because its application is not limited to "persons with a history of bad conduct." Pet. Br. at 23.[11] Such arguments amount to nothing more than thinly disguised attempts[12] to reargue the question of the appropriate distinctions between statutes and injunctions which this Court has already addressed twice in the past few years. Further, they profoundly distort the role of a legislature.

A legislature passing a new law to address a broad social problem cannot limit its application to those who are already lawbreakers or who have already behaved inappropriately. Such an approach would create problems of retroactive application, probably invalidating the law. *See* U.S. Const., Art. I, § 9(3).

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11. *See also* Pet. Br. at 14, 25, 26 n.18, 27, 41 n.34; ACLU Br. at 12, 22; AFL-CIO Br. at 2, 20-21; PETA Br. at 17, 23-24; Liberty Counsel Br. at 2, 5-6.

12. Or undisguised attempts — one *amicus* expressly questions the *Schenck* and *Madsen* distinction between injunctions and statutes. ACLU Br. at 8, 17-18.

It would also fail to address the problem: the legislature acted here because existing laws had not controlled the problem, or were unenforceable in the crowded, confrontational demonstrations described. J.A. 94, 105, 117, 121-22, 124-25, 159, 208.

The role of a legislature is not to punish after the fact, but, through the laws it enacts, to set standards as to what is expected of everyone in the future. Laws are enacted to deter harmful conduct by those who have not already indulged in it, as well as those who have. Legislatures may act to prevent harms from reasonably anticipated results, rather than picking up the pieces after problems rise to their most acute level. *See Turner Broadcasting System*, 520 U.S. at 212. They may consider the harm inflicted on society from the tactics employed by one group and act to prevent the greater harm that would follow if a number of groups adopted the same tactics, *Clark*, 468 U.S. at 296, as the legislature did here. J.A. 109, 113, 155, 157, 210. This law is no less valid because the legislature did not wait until every possible group with a grievance laid siege to every health care facility in Colorado with the same threatening and obstructive tactics.

C. The statute is content-neutral. The statute satisfies the first prong of the *Ward* test, in that it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791, quoting *Clark*, 468 U.S. at 293. The statute is clearly aimed at the crowding and threatening conduct of an overly close approach, and does not prevent communication, no matter what the message. The legislature discussed the fact that the statute would also regulate pro-choice, animal rights, or anti-Medicaid demonstrators.[13] J.A. 113, 139, 208; *see also* J.A. 106 (use of Denver ordinance by anti-abortion protesters to protect themselves). Opponents of the bill criticized it for applying to

13. Indeed, the *amicus* briefs supporting Petitioners from People for the Ethical Treatment of Animals and the AFL-CIO demonstrate this point.

such things as circulating voter initiative petitions, J.A. 215, labor picketing, J.A. 145, or political campaigning, J.A. 191.[14] The bill's sponsor argued against an amendment focusing on strengthening the harassment laws because it might be content-based and thus have constitutional problems. J.A. 121.

The legislature recognized that it could not regulate speech for offensive content. Although some of the testimony and legislative debate discussed the extremely offensive terms (*e.g.*, "murderer" and "baby-killing bitch") used by some demonstrators outside clinics, J.A. 69-71, 98-99, 134-36, 152-54, the focus was on the heightened threat of any message delivered at extremely close range. *Id.*; *see, e.g.*, J.A. 99 ("whether you're one foot away or eight feet away, the words have the same impact, the same meaning and they can be just as abusive, but at least they are not in the people's faces."). The legislature enacted a statute that both proponents and opponents agreed did not attempt to regulate "nastiness [or] zealous obscene verbal abuse," J.A. 183, or "foolish," "wrong" or "inappropriate" things, J.A. 80, but only the proximity of any message. The sponsor stated the intent and operation of the bill during the floor debate:

> We're not telling people what they can say. They can say anything that, that they want. And we're not preventing them from talking to anyone. In fact, they can do it from 8 feet away.

J.A. 137; *see also* J.A. 138 ("I don't care what side you're on. If you're pro or con, stay back 8 feet. And that gives everybody their right to speak their piece.").

Both by its plain terms and its legislative history, the statute does not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner*

14. Petitioners' own examples of the statute's application show its content-neutrality. Pet. Br. at 9.

Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643 (1994). It makes no attempt to single out any topics of speech, such as labor, political, or religious speech. Thus, it is not content-based, such as the statutes evaluated in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (exempting labor picketing); *Carey v. Brown*, 447 U.S. at 461 (same); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (burdening only political speech); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (same); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993) (burdening only religious speech). The statute applies to speech on any topic.

Neither does the statute single out any speech based on the viewpoint of the speaker, unlike the provision invalidated in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (striking down "bias-motivated crime" ordinance that expressly applied to only one side of a debate). The legislative history shows that the statute was drafted and intended to apply to all sides and all topics of debate outside health care facilities.

Petitioners and *amici* argue that the statute's application to approaches for "oral protest, education, or counseling"[15] is content-based, although they admit it applies neutrally to all signs and leaflets. Pet. Br. at 31-32. The Colorado Supreme Court apparently understood that Petitioners had waived any argument on this issue. Pet. App. 21a. Regardless of any waiver, the Colorado Supreme Court correctly determined that the statute is content-neutral, because, "The restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."[16] Pet. App. 22a.

15. These terms were apparently taken verbatim from the Boulder and Denver ordinances. *See* R. Vol. II, at 278.

16. Petitioners and *amici* misleadingly quote from the original, **vacated** decision of the Colorado Court of Appeals rather than the (Cont'd)

The Colorado Supreme Court's ruling confirms that the statutory language should be interpreted to refer to approaches for all communication, as Colorado has argued since the beginning of this case. J.A. 293-94.[17] Consistent with the legislative history and the obligation of the courts to interpret statutes to be constitutional if possible, "protest" is used to mean any statement of any viewpoint, and is not limited to negative statements. "Counseling" includes any attempt at debate, and "education" any attempt to offer information. These cover all inquiries as well. This interpretation is consistent with the legislative history, which shows that the legislature was concerned with the proximity of demonstrators, not the content of their messages. J.A. 113, 137-39, 145, 191, 208, 215.[18]

Petitioners apparently are concerned that the statute might be interpreted to exempt simple greetings and social conventions unlikely to raise feelings of threat, such as "Good morning," or "Do you have the time?" As noted, this appears contrary to the Colorado Supreme Court's interpretation. In any case, the only distinction this interpretation raises is between speech expressing some content and innocuous social phrases. This Court has not struck down any regulation on the basis of such a

(Cont'd)
decision under review here, or even the second Court of Appeals decision that was affirmed by the Colorado Supreme Court. Pet. Br. at 46 n.36, Life LDF Br. at 10-11.

17. Contrary to Petitioners' argument, Pet. Br. at 32 n.24, this interpretation does not make the statute overbroad; rather, it is an extremely limited, narrowly tailored place regulation, as set forth in Section II.D below. Petitioners' arguments on the oral communication prong of the statute set up an insupportable constitutional Catch-22, in which the statute is either invalid as content-based because it does not apply to all communication, or invalid as overbroad if it does.

18. One legislator may have advanced the idea that the statute did not cover commercial speech, but then seems to have dropped it. J.A. 175.

distinction, and should not do so now. Both *Schenck* and *Madsen* upheld injunctions that restricted "demonstrating," 519 U.S. at 366-67; 512 U.S. at 768, which also could be interpreted to exclude social conversations.

This Court should interpret the statute consistently with the Colorado Supreme Court's implicit conclusion that the statute applies to all communication, in order to eliminate any possible constitutional question. *See Frisby*, 487 U.S. at 482-83 (adopting narrowing construction of residential picketing ordinance); *United States v. Grace*, 461 U.S. 171, 176 (1983) (interpreting prohibition on "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" to apply to almost any sign or leaflet carrying a communication to avoid constitutional problems; law struck down on other grounds). Such an interpretation eliminates all possible confusion that Petitioners or supporting *amici* are able to imagine, and is consistent with the legislature's intent to regulate all targeted, overly close approaches regardless of content.

The consent provision of the statute does not affect its content-neutrality. Like the "cease and desist" provision within the fixed buffer zone that this Court upheld in *Schenck*, 519 U.S. at 381 n.11, the record is clear that the legislature included the consent provision in order to burden as little speech as possible, and to preserve anyone's right to have a face-to-face discussion or take a leaflet **if both parties desire such an interaction**. J.A. 148 (consent provision a "safeguard"), 211 (consent "the most important part" of the provision); *see also* J.A. 82, 87, 114-15, 118, 137, 185, 214. Like the *Schenck* cease-and-desist provision the consent provision should be assessed in light of the fact that it was included to enhance speech rights, and upheld. 519 U.S. at 383-84. Again like the *Schenck* cease-and-desist provision, it should not be regarded as content-based, because demonstrators remain free to espouse their message outside the eight-foot limit, and the restriction

on approaches within eight feet is a response to previous harassment and intimidation. 519 U.S. at 385.

The approach taken by the Colorado legislature is similar to that approved by this Court in *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 737 (1970), recognizing that different individuals might find different mailings offensive, and thus upholding a statute which allowed an individual the absolute discretion to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive. *See also Breard v. City of Alexandria*, 341 U.S. 622, 643 (1951) (restriction on unwanted commercial solicitation upheld, distinguishing *Martin v. City of Struthers*, 319 U.S. 141 (1943)). Consent is a well-recognized concept used to regulate close physical interactions, from trespass to sexual assault. Here it allows the individual accessing a medical clinic to control only whether a demonstrator's message may be expressed in that individual's face or from a few steps away.

The statute is justified in part by patients' sense of intimidation and threat from the **manner and proximity** of in-your-face approaches. This satisfies the *Ward* standard of "justified without reference to the content of the regulated speech," 491 U.S. at 791, because the statute is not justified by audience reaction to the **content** of speech. This Court has approved a number of time, place, or manner regulations because of the annoying or troublesome nature of speakers' conduct in inappropriate locations, including intrusively amplified speech in residential areas, *Kovacs v. Cooper*, 336 U.S. 77 (1949); targeted picketing of individual residences, *Frisby*, 487 U.S. at 477; noisy demonstrations near schools, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); demonstrations that interfere with the proper operation of jails, *Adderley v. Florida*, 385 U.S. 39 (1966), or courthouses. *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cameron v. Johnson*, 390 U.S. 611 (1968).

Here, the legislature heard descriptions of demonstrations that were highly offensive in both their content and in their location — inches away from patients seeking to turn away from the demonstrators and safely enter medical facilities. The legislature appropriately acted to control the threatening, overly close personal proximity of the expressive activity but not its content. The consent provision does not change this, but instead makes the statute more narrowly focused, because it is **unwanted** nose-to-nose communications that trigger the sense of physical invasion, while agreed-upon face-to-face conversations do not. J.A. 227-29, ¶¶ 6-8, 286-88, ¶¶ 10, 13.

This narrow restriction on close personal proximity does not create a "heckler's veto," like the one held to be improperly content-based in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Colorado has not empowered a hostile mob to drive unpopular speakers from an entire forum, such as the streets of a county, *id.*, or village. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). Rather, within a narrowly circumscribed area near health care facilities, it has empowered vulnerable patients, family, and staff to keep unwanted, intimidating, physically threatening demonstrators at arms' length. Demonstrators' messages will still be clearly visible and audible to their intended audience and the public at large, *see* J.A. 107, 219, 223, 225, 230, unlike the broad provisions in *Forsyth County* and *Skokie*. Demonstrators are free to express their messages in their chosen forum immediately outside medical clinics by simply standing still or refraining from rushing patients. Like the District Court's inclusion of the cease-and-desist provision within the *Schenck* fixed buffer zone, the legislature's "extra effort to enhance [demonstrators'] speech rights" by allowing consented approaches as an exception to the eight-foot zone of separation should not redound to Colorado's detriment. 519 U.S. at 381 n.11.

D. The statute is narrowly tailored to serve substantial and compelling governmental interests. The statute is expressly designed to safeguard access to medical care. § 18-9-122(1), C.R.S. (1999). The legislative debate also reveals other goals: protecting public safety and order, assuring freedom of movement on sidewalks and streets, preventing violent confrontations, and improving enforcement of existing laws against assault.[19] J.A. 114, 117, 122, 124-25, 138, 149, 212. This Court has already recognized these interests as substantial. *Schenck*, 519 U.S. at 376; *Madsen*, 512 U.S. at 767-68. Public health, welfare and safety are core government goals. *See Metropolitan Life Ins. Co.*, 471 U.S. at 756 (health); *Nollan et ux. v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (safety); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals").

The Colorado Supreme Court recognized preservation of access to medical care as a compelling interest, relying on this Court's articulation of the constitutional right to privacy, including the right to control certain medical decisions. Pet. App. 13a-16a; *see also* J.A. 124. Contrary to Petitioners' arguments, *see* Pet. Br. at 35, the Colorado Supreme Court did not base its ruling on the right to be let alone on public sidewalks, but on the right to safe access to medical services as a component of the overall right of privacy. The court recognized, as one *amicus* has admitted, that such rights "quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation, and harassment." ACLU Br. at 1.

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19. Petitioners, instead of addressing the government interests shown on the face of the statute and in the legislative history, have chosen to invent "straw interests" to knock down, Pet. Br. at 35-36 (protection from "offensive or controversial" speech, right to be left alone on public sidewalks), or to claim that no "valid," "conceivable," or "legitimate" government interest underlies the statute. Pet. Br. at 19, 34, 35, 37.

Burson v. Freeman, 504 U.S. 191, is instructive here. This Court upheld an explicitly content-discriminatory statute that banned **all** political speech within 100 feet of polling places, because of the state's compelling interest in protecting voters from intimidation and interference. *Id.* at 199. Relying on a history of abuses outside polling places, *id.* at 200-06, this Court determined that laws prohibiting interference with elections or intimidation of voters fell short by dealing with only the most blatant and specific attempts to impede elections. *Id.* at 206-07. Noting that it takes approximately 15 seconds to walk 75 feet, this Court said:

> The State . . . has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.

Id. at 210.

Colorado has an equally compelling interest in protecting the right of safe access to potentially life-saving medical treatments such as pap smears, J.A. 62, 136, 195, cancer treatment, J.A. 59, 105-06, 217-18, surgery, J.A. 156, and organ transplants, J.A. 107, from intimidating and disorderly conduct. *See Bering v. SHARE*, 721 P.2d at 929. The Colorado General Assembly's decision to make the last two seconds before a demonstrator can make physical contact with a patient free from interference is not an unconstitutional choice.

The statute is narrowly tailored to serve these substantial and compelling interests. Within 100 feet of health care entrance doors, it regulates only a demonstrator's unconsented, targeted approach within eight feet, so close that it is virtually indistinguishable from a physical threat. J.A. 227, 229, 273-83, *see also* J.A. 114, 218, 220-21, 223, 224. The statute simply gives patients, family and staff a small space in which to keep moving, and to be out of the reach of a swinging fist or foot, or a sign wielded as a weapon.

Subsection (3) is not duplicative of subsection (2)'s prohibition on blocking access. Under the more rigorous test for injunctions, this Court upheld 36-foot and 15-foot fixed buffer zones in *Madsen* and *Schenck* that prohibited all or almost all expressive activity within them, in spite of separate provisions in the injunctions that prohibited blockades. *Madsen*, 512 U.S. at 759, 769-70; *Schenck*, 519 U.S. at 381-82. Without the "prophylactic measure" of the fixed buffer zone approved in *Schenck*, it was reasonable to conclude that demonstrators would, as they had in the past, continue to crowd patients and interfere with access. 519 U.S. at 381-82. Without the similar prophylactic measure of the eight-foot zone of separation in the statute, the legislature reasonably feared that demonstrators would continue to crowd and surround patients at such close quarters that intimidation was inevitable, access difficult, and enforcement of existing harassment and assault laws hampered.

The statute does not share the problems of the no-approach or moving zones struck down under the stricter test of *Schenck* and *Madsen*. First, it applies only within eight feet, a normal conversational distance with strangers, rather than the 15-foot distance in *Schenck*. Unlike the immense "no-approach" zone in *Madsen*, where it was not clear how near or far a demonstrator could be before he was prohibited from approaching, the statute does not restrict "all uninvited approaches . . . , no matter how peaceful." 512 U.S. at 774. Rather, it applies only within eight feet of a targeted person, where the conduct of an uninvited approach is not peaceful, but threatening. The statute prevents no communication, because speech, signs and handbills can be perceived at eight feet, whether or not the target consents. Of note, this Court refused to strike down the cease-and-desist provision within the fixed buffer zone in *Schenck* on the basis of *Madsen's* invalidation of the consent-based no-approach zone, noting that *Madsen* was "easily distinguishable" because of the breadth of the 300-foot zone. 519 U.S. at 384 n.12.

Second, the statute applies only to a knowing approach, so there is no possibility of an inadvertent violation, and the demonstrator may stand still and is not forced to retreat from advancing patients or staff. *See* Pet. App. 21a, 24a-25a; *see also* ACLU Br. at 6, 15 n.9 (admitting differences from injunction that "ameliorate" statute's application). Thus, unlike the injunction in *Schenck*, the statute does not restrict "those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully." 519 U.S. at 380. Finally, it applies only between the demonstrator and the individual the demonstrator is trying to talk to, and not to bystanders or others who might approach the demonstrator from behind or from several directions. Thus, unlike the injunction in *Schenck*, the movement of a third party cannot cause a demonstrator to violate the statute, Pet. App. 28a, so that "attempts to stand 15 feet [or eight feet, under this statute] from someone entering or leaving a clinic and to communicate a message" are not made hazardous, but are fully protected. 519 U.S. at 378.

Finally, Colorado has relied only on subsection (2)'s prohibition on blocking access and subsection (3)'s eight-foot zone of separation to accomplish the same purposes as the multi-part injunctions in *Schenck* and *Madsen*. Those injunctions prohibited: (1) demonstrating within both fixed buffer zones (of 15 feet and 36 feet, respectively) **and** moving zones of separation; (2) blocking access; and (3) "physically abusing, grabbing, touching, pushing, shoving, or **crowding**," *Schenck*, 519 U.S. at 366 n.3 (emphasis added); or "physically abusing, grabbing, **intimidating**, **harassing**, touching, pushing, shoving, **crowding** or assaulting" persons accessing the clinics. *Madsen*, 512 U.S. at 760 (emphasis added). The statute's narrow place limitation prevents exactly the crowding, intimidation, and harassment prevented by the *Schenck* and *Madsen* injunctions, in a way that sets more precise standards for demonstrators, patients, and law enforcement.

Contrary to the arguments of Petitioners and supporting *amici*, the statute does not lack narrow tailoring merely because it applies to all demonstrations outside all health care facilities and addresses prospective misbehavior rather than past offenses. *See, e.g.*, Pet. Br. at 23, AFL-CIO Br. at 6, 11 n.4. Rather, these are the proper characteristics of a non-discriminatory, non-retroactive statute of general application. *See Madsen*, 512 U.S. at 764. As the Colorado Supreme Court found, these very characteristics make the statute comprehensive and content-neutral. Pet. App. 25a.

Further, the misbehavior and access problems noted in the Statement of the Case, *supra*, are comparable to those in *Schenck* and *Madsen*, albeit in a different context. *See Turner Broadcasting System*, 512 U.S. at 666 ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.") These "disturbing acts of harassment and intimidation," acknowledged by one *amicus*, *see* ACLU Br. at 12, required a response, and legislatures do not enter injunctions. The courts in *Schenck* and *Madsen* entered injunctions that applied broadly to a host of individuals and organizations, as well as unnamed and unknown individuals later found to be "in concert" with the defendants. *Madsen*, 512 U.S. at 759 n.1; *Schenck*, 519 U.S. at 366 n.3. Here the legislature addressed the problem as narrowly as possible considering both the harmful behavior of anti-abortion demonstrators and the harm likely if other groups adopted similar tactics outside medical clinics. *See Clark*, 468 U.S. at 296; *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981).

The statute's effect on peaceful advocacy is minimal, requiring only a simple inquiry to "reach the minds [and hands] of willing listeners," *see Kovacs*, 336 U.S. at 87, and allowing clearly audible and visible messages near unwilling listeners. Regardless of Petitioners' and *amici's* protestations, it is impossible not to share the suspicion of a legislator that,

"[T]he only reason you would want this out of there, if you wanna get in my face closer than 8 foot and argue your case." J.A. 139. The statute prohibits only unconsented-to advocacy at such a personally invasive distance that it is coercive, physically intimidating and inescapable.

Petitioners' and *amici's* arguments advocate that this Court recognize a new First Amendment right to coerce listeners through physically invasive conduct — a right this Court has consistently **refused** to endorse. "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators cannot "insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). A passerby "may be offered a leaflet but cannot be made to take it." *Kovacs*, 336 U.S. at 86-87.[20] This Court has recognized a distinction between general expressive activity and activity intrusively focused on a desired audience. *Madsen*, 512 U.S. at 769, *see also id.* at 780-81 (Stevens, J., concurring in part and dissenting in part). If there is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it," *Frisby*, 487 U.S. at 488, there is an even stronger interest in regulating the close proximity of speech directed at those who actually decline to receive it.

The rote invocation of the rule that those subjected to unwanted messages in public must simply turn away from them, or are "free to walk away," ACLU Br. at 5; *see also* ACLU Br. at 21, PETA Br. at 9, assumes demonstrators who observe minimum standards of behavior. The clear record

20. *See also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (right recognized in previous cases "to tender the written material to the passerby who may reject it or accept it.").

before the legislature shows demonstrators who failed to observe such standards, converting the right to walk away into a right to be chased away from exercising another protected constitutional right by hostile mobs of demonstrators who used signs and leaflets as walls and weapons. J.A. 66-67, 70, 93-95, 98-100, 105-06, 154, 158-59; *see also* J.A. 218-26, 229-30, 273-83. Turning away from an unwanted message is also much more difficult when a patient, driven by need for medical treatment, must access a particular entrance door that has been laid siege to by demonstrators.

In the special circumstances outside health care facilities the need for safety and space is heightened. *See* J.A. 108 ("You don't need somebody standing in your face screaming at you when you are going in for what may be one of the most traumatic experiences of your life anyway." (statement of disabled patient who had undergone 35 surgeries)); *see also* J.A. 156-57, 228, 289. For those few close approaches that might not threaten, crowd, impede or obstruct, the statute imposes the slight burden of requiring a simple request to approach. There is no obvious alternative of a sufficiently clear and enforceable statute that could separate out those few close approaches that are non-threatening from the vast majority of unconsented, overly close approaches that have caused and will continue to cause access, health and safety problems if left unregulated.

Thus, even though not required to be under the applicable standard,[21] the statute is in reality the least restrictive alternative

21. Content-neutral time place or manner regulations cannot be held invalid "simply because there is some imaginable alternative that might be less burdensome on speech," *Ward*, 491 U.S. at 797, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 218, and are narrowly tailored "so long as [they] promote[] a substantial government interest that would be achieved less effectively" in their absence. *Ward*, 491 U.S. at 799, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 213-14.

to serve a compelling state interest. The restriction on physical blockades in subsection (2) dealt with only part of the problem before the legislature. It failed to adequately address either physical threats or crowds of demonstrators so numerous that both movement and effective law enforcement became unreasonably difficult. The legislature considered broader fixed buffer zones imposed by courts, and adopted the eight-foot zone of separation in part because it was narrower. J.A. 115-16, 122. The consent provision, rather than an immutable eight-foot zone of separation, was adopted in order to allow more speech. J.A. 82, 87, 114-15, 118, 137, 148, 185, 211, 214. Existing harassment and assault statutes had failed to address the problems created by crowds, and were discussed as subjective and difficult to enforce. J.A. 94, 124-25, 159. An amendment to make the harassment statute more specific to address some of the problems described was rejected as again subjective, difficult to enforce, and possibly content-based. J.A. 120-28.

There is no adequate alternative that accomplishes the goals of the challenged statute more narrowly. Petitioners and supporting *amici* have not articulated any.[22] Instead, they deny that the problem of violence and physical threats exists, AFL-CIO Br. at 3-4, 6, 10, 13, 15, Liberty Counsel Br. at 17 ("no evidence of violent activity"); assert (contrary to the legislative history) that other statutes adequately address the problem, Pet. Br. at 21 n.13, ACLU Br. at 12; or admit the problem but simply throw up their hands and state that the First Amendment leaves Colorado powerless to address such problems. ACLU Br. at 12-13. Such arguments, by their omission of any adequate alternative, demonstrate that the statute is the least restrictive alternative, and is narrowly tailored under any applicable test.

22. At least, none have been articulated to date in six years of legal proceedings and hundreds of pages of briefing.

E. The statute leaves open ample alternative channels of communication. The statute leaves open a wide range of communicative channels, through which demonstrators immediately outside health care facilities can still make their message known to their intended audiences of patients, staff, families, and passersby. Within 100 feet of health care facility entrances it allows standing in one spot and speaking, offering leaflets, or holding signs as people walk by at any distance.[23] It also allows walking up at any distance to anyone who has reached out their hand, nodded, or said "yes" to either the silent offer of a leaflet or a simple question such as "Can we talk?" or "Would you like this leaflet?" Under the statute, the opinions and consent of any bystanders or companions to the person approached do not control the legality of the approach. If some members of a group consent while others refuse, the demonstrator may continue to approach with the simple clarification that "I'm talking to her," or "I'm asking her."

Within 100 feet of health care facility entrances, the statute also allows speaking in normal conversational tones (or shouting and using bullhorns, if that is the demonstrator's choice), offering a leaflet or holding a sign, eight feet away from anyone who has refused consent or whose consent has not been requested. This includes walking towards someone and stopping at eight feet, walking alongside, or walking behind.[24] Finally, farther than 100 feet from health care facility entrances, the statute allows unrestricted approaches for speech, leafleting or picketing.

23. Standing in a blockade is prohibited by section (2).

24. Every law or injunction which includes a physical distance limitation is susceptible to possible accidental violation. *See, e.g., Burson v. Freeman*, 504 U.S. at 199. This is a criminal statute, however, and the burden is on the state to prove every element of the offense beyond a reasonable doubt. Only clear violations obvious to demonstrators, patients, and observing police officers, rather than *de minimus* violations of the statute by a few inches, will be provable or prosecutable.

The operation of the statute does not ban or significantly impair "normal," "traditional," or "peaceful" expressive activity, contrary to Petitioners' and *amici's* arguments. *See* ACLU Br. at 2, 7, 20; AFL-CIO Br. at 3, 7; PETA Br. at 22. The statute is not aimed at and barely affects traditional leafleting. Most leafletters stand or walk slowly, offering their leaflets with a question or exhortation, and either allow people to walk past them and take the leaflet or only step towards those who nod, hold out a hand, or respond verbally — all "consents" under the statute. The cases relied on by Petitioners and *amici* stand for the proposition that leafleting "may not be prohibited at all times, at all places, and under all circumstances." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). This Court has accordingly struck down bans on leafleting or licenses to leaflet in entire towns or other fora. *Id.*; *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *Schneider*, 308 U.S. at 162; *United States v. Grace*, 461 U.S. at 176. The cases are devoid of any indication that traditional protected leafleting (or, as Petitioners put it, the "most sacred archetype" of free speech, Pet. Br. at 43) includes the right to shove leaflets into car windows and faces, and to crowd and surround targets until they agree to accept the unwanted message. To the contrary, they support regulation of leafleting if "inconsistent with the maintenance of public order, or . . . involving disorderly conduct, **the molestation of the inhabitants**, or the misuse or littering of the streets." *Lovell*, 303 U.S. at 451 (emphasis added). *See also Schneider*, 308 U.S. at 162 (ordinance may not prohibit "a person rightfully on a public street from handing literature **to one willing to receive it**" (emphasis added)); *Jamison*, 318 U.S. at 416 (the right to express views "in an orderly fashion"); *Kovacs*, 336 U.S. at 86-87; *Taxpayers for Vincent*, 466 U.S. at 810. Thus the effect of the statute on leafleting is slight, serving only to protect the targeted individual's right to refuse an unwanted leaflet, and is not comparable to those broad bans on leafleting that this Court has found to raise constitutional problems.

III.

THE STATUTE IS NOT OVERBROAD.

Petitioners argue that the statute is overbroad, Pet. Br. at 22-27, a doctrine that is simply inapplicable to this time, place or manner regulation. Overbreadth, as Petitioners use it, applies to attempts to regulate to prevent a type of speech or activity that is unprotected because of its content, such as fighting words or fraud. Statutes that miss this target of unprotected speech or activity, and sweep too broadly to include protected speech, are overbroad. For example, in *City of Houston v. Hill*, 482 U.S. 451 (1987), the challenged ordinance attempted to prevent interference with police officers or fighting words directed at police officers. It was written so broadly, however, that it unconstitutionally criminalized any verbal interruption or verbal criticism of police. *Id.* at 461-62. The Court noted that the city was not powerless to punish "physical obstruction" of police. *Id.* at 462 n.11.

In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), the statute in question attempted to regulate fraud by limiting a charity's expenses to only 25% of its total intake from solicitations. It was unconstitutionally overbroad because it operated on the "fundamentally mistaken premise" that high charitable fundraising expenses were an indication of fraud. *Id.* at 966.

Petitioners' overbreadth argument fails even if the doctrine is applied to this time, place or manner regulation because Petitioners never identify a fundamentally mistaken premise for the statute. To the contrary, the statute is based on a premise supported by social science, common experience, and specific testimony before the legislature: too-close, unconsented approaches by demonstrators immediately outside health care facilities endanger safe health care through physical intimidation, increase the risk of obstruction, and hinder law enforcement.

IV.

THE STATUTE IS NOT A PRIOR RESTRAINT: IT DOES NOT ALLOW A PUBLIC OFFICIAL TO PREVENT THE EXPRESSION OF A MESSAGE TO THE PUBLIC.

Prior restraints typically involve a public official censoring the expression of a message to the public because of its content, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), or denying use of an entire forum because of speech's content, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), all in advance of the actual expression.

The statute here simply does not fit within any understanding of a prior restraint, as shown by this Court's determination of the prior restraint challenges in *Schenck* and *Madsen*. The Court dismissed such challenges in footnotes, holding that there is no prior restraint if "alternative channels of communication [are] left open," *Schenck*, 519 U.S. at 374 n.6, and demonstrators "are not prevented from expressing their message in any one of several different ways; they are simply prevented from expressing it within [an appropriate] buffer zone." *Madsen*, 512 U.S. at 763 n.2. Likewise, here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them while approaching unconsenting targets within eight feet. This is not a prior restraint.

Petitioners also disregard this Court's definition of prior restraints as regulations that give **public officials** censorship powers. *See, e.g., Southeastern Promotions*, 420 U.S. at 553.[25]

25. *See also Riley v. National Federation of the Blind, Inc.* 487 U.S. 781, 802 n.14 (1988) ("Secretary of State has unbridled discretion"); *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a government official"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. at 964 n. 12 ("unguided (Cont'd)

A statute creating a limited buffer zone to allow medical patients to escape obstructive, in-your-face harangues is simply not analogous to the actions of a government censor denying access to an entire forum. Even if the decisions of patients are imputed to the government, the statute still cannot be a prior restraint because it restricts only overly close personal proximity and does not prevent the expression of any message. Demonstrators remain completely free to speak, picket, and leaflet in their chosen forum immediately outside health care facilities.

V.

THE STATUTE IS NOT VAGUE.

The statute uses easily understood terms and sets precise standards, regardless of Petitioners' attempts to obscure them. "Oral protest, education, and counseling" are not vague terms. Petitioners misleadingly quote the vacated Court of Appeals decision, Pet. Br. at 46, n.36, *see also* Life LDF Br. at 3, 7, 10-12, to further obscure the issue. The terms are reasonably intended and interpreted to refer to all oral communication of any content. Further, if the term "demonstrating" used in *Schenck* gave adequate notice of prohibited conduct, the more precise terms of this statute do as well. *See* 519 U.S. at 383, *see also Grayned*, 408 U.S. at 111 (prohibition on demonstrations "adjacent" to schools that "tend to disturb" class not vague).

(Cont'd)
discretion of the Secretary of State"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("licensing officials" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an administrative office"); *Cox v. Louisiana*, 379 U.S. at 557 ("such broad discretion in a public official"); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (discretionary power in "administrative official"); *Saia v. New York*, 334 U.S. 558, 560-61 (1948) ("uncontrolled discretion of the Chief of Police"); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) ("determination by state authority").

"Approach" is a commonly understood term, further clarified by the Colorado Supreme Court's determination that standing still would not violate the statute. Pet. App. 26a. The incidental movement of a hand, rather than movement of the whole body, will not trigger the statute.

Arguments on the vagueness of "consent" defy belief. Pet. Br. at 47-48, PETA Br. at 28, Life LDF Br. at 7. If consent is truly a vague term, thousands of sexual assault, assault and battery laws throughout the nation are void as well.[26] As in any criminal prosecution, consent is a question of fact to be determined by law officers, prosecutors, and the triers of fact in each case. Such questions of fact do not render the statute vague.

26. A search revealed 1,028 uses of the term "consent" in the Colorado Revised Statutes alone. *See, e.g.*, § 18-3-203(1)(e) (assault in the second degree); § 18-3-302(1) (second degree kidnapping); § 18-3-404(a) (sexual assault in the third degree), C.R.S. (1999).

CONCLUSION

The judgment below, upholding the statute as a reasonable exercise of the Colorado General Assembly's authority to ensure safety and order for citizens seeking access to health care, should be upheld.

Respectfully submitted,

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